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No. 88-89

In the Supreme Court of the United States

OCTOBER TERM, 1988

GOLDEN PACIFIC BANCORP., PETITIONER

v.

ROBERT L. CLARKE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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TABLE OF AUTHORITIES

Cases: Page

Allen v. *United States*, 816 F.2d 1417 (10th Cir. 1987), cert. denied, No. 87-316 (Jan. 11, 1988) 12, 13

Berkovitz v. *United States*, No. 87-498 (June 13, 1988) ... 5, 6, 10

Brown v. *United States*, 790 F.2d 199 (1st Cir. 1986), cert. denied, No. 86-528 (Jan. 20, 1987) 12

Cisco v. *United States Through EPA*, 768 F.2d 788 (7th Cir. 1985) 12

Conservatorship of the Wellsville Nat'l Bank, In re, 407 F.2d 223 (3d Cir.), cert. denied, 396 U.S. 832 (1969) 7

Consolidated United States Atmospheric Testing Litigation, In re, 820 F.2d 982 (9th Cir. 1987), cert. denied, No. 87-953 (Feb. 29, 1988) 11

Dalehite v. *United States*, 346 U.S. 15 (1953) 7, 9, 11

Davis v. *FDIC*, 369 F. Supp. 277 (D. Colo. 1974) 8

Easton v. *Iowa*, 188 U.S. 220 (1903) 8

Eklof Marine Corp. v. *United States*, 762 F.2d 200 (2d Cir. 1985) 12-13

Emch v. *United States*, 630 F.2d 523 (7th Cir. 1980), cert. denied, 450 U.S. 966 (1981) 8

FDIC v. *Holders of Yellow Certificates Nos. 1-367*, No. 85-8164 (S.D.N.Y. Sept. 16, 1986) 2

FDIC v. *Jennings*, 615 F. Supp. 465 (W.D. Okla. 1985), aff'd, 816 F.2d 1488 (10th Cir. 1987) 8

First Sav. & Loan Ass'n v. *First Fed. Sav. & Loan Ass'n*, 531 F. Supp. 251 (D. Haw. 1981) 8

First State Bank v. *United States*, 471 F. Supp. 33 (D.N.J. 1978), aff'd, 599 F.2d 558 (3d Cir. 1979) 8

Franklin Nat'l Bank, In re, 381 F. Supp. 1390 (E.D. N.Y. 1974) 7

FSLIC v. *Williams*, 599 F. Supp. 1184 (D. Md. 1984) 8

Hatahley v. *United States*, 351 U.S. 173 (1956) 12

Huntington Towers, Ltd. v. *Franklin Nat'l Bank*, 559 F.2d 863 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978) .. 10-11

Myers & Myers, Inc. v. *United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975) 10

Cases—Continued: Page

Myslakowski v. *United States*, 806 F.2d 94 (6th Cir. 1986), cert. denied, No. 86-1389 (Mar. 30, 1987) 12
Newberg v. *FSLIC*, 317 F. Supp. 1104 (N.D. Ill. 1970)... 8
Smith v. *Johns-Manville Corp.*, 795 F.2d 301 (3d Cir. 1986) 11-12
Taylor v. *Federal Home Loan Bank Board*, 661 F. Supp. 1341 (N.D. Tex. 1986) 8
United States v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984) 4, 6, 7, 9-10, 11
Washington Nat'l Bank v. *Eckels*, 57 F. 870 (C.C.W.D. Wash. 1893) 6

Constitution, statutes and regulation:

U.S. Const. Amend. V 4, 5
Administrative Procedure Act, 5 U.S.C. 701 *et seq.* 4
Federal Tort Claims Act:
28 U.S.C. 2671 *et seq.* 4
28 U.S.C. 2680(a) 1, 4, 11
12 U.S.C. 191 ..... 6, 7
12 U.S.C. 203 6
12 U.S.C. 481 6
12 U.S.C. 1818 6
12 C.F.R. 5.49(c) 7

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals erred in holding that its claim against the Comptroller of the Currency arising out of the appointment of a receiver for a national bank was barred by the discretionary function exception to the Federal Tort Claims Act (28 U.S.C. 2680(a)).

1. a. Petitioner is a bank holding company that owned 90 percent of Golden Pacific National Bank (Bank) (Pet. 3). On June 17, 1985, on the basis of an informant's tip, the Comptroller of the Currency began a surprise investigation of the Bank. The Comptroller's examiners discovered that the Bank had been issuing certificates of deposit known (because of their color) as "yellow CDs," which were not recorded on the Bank's books and were never made available to the examiners during routine bank

examinations (Pet. App. 3a). The Bank claimed that the yellow CDs were investments, not deposits, and were subject to a form agreement that exonerated the Bank of liability for any loss of the customers' funds. The Bank was unable to produce any such signed agreements, however (*id.* at 4a).

To assess the Bank's financial condition, the examiners had to determine whether the yellow CDs were deposits with the Bank or, as Bank officials claimed, investments placed with the Bank as agent. If the yellow CDs were deposits, they represented off-balance sheet liabilities of the Bank and raised the question whether the Bank had sufficient off-balance sheet assets to avoid technical insolvency—an excess of liabilities over assets (Pet. App. 3a-4a). As to the first issue, Comptroller's examiners concluded that the yellow CDs were deposits (*id.* at 4a).[1] The CDs looked like ordinary certificates of deposit, stated a fixed rate of interest, set a maturity date, and bore the Bank's name across the top in block letters. The Bank also treated the yellow CDs in the same manner as ordinary CDs, honoring them upon maturity or, if appropriate, upon demand. No investments were liquidated to pay the CDs, and the return paid to customers did not reflect the risk of any investment.

As to the existence of off-balance sheet assets adequate to cover the yellow CDs, the examiners repeatedly asked Bank officials for documentation of these assets. On the last day of the examination, the Bank produced certain

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[1] This determination was confirmed by a federal district court in an action brought by the FDIC to obtain a declaration as to whether the yellow CDs represented insured deposits of the Bank such that their holders would be entitled to federal deposit insurance coverage. *FDIC* v. *Holders of Yellow Certificates Nos. 1-367,* No. 85-8164 (S.D.N.Y. Sept. 16, 1986). Pet. App. 7a.

documents. The documents related to a $7.8 million investment in a limited partnership (of which the Bank president's wife was the general partner), 83 unvalued condominiums in Taiwan, and several other financial arrangements, including stock in the Bank. Pet. App. 4a. The investments were not in the Bank's name, nor could the Bank document its ownership or legal interest in the investments (*id.* at 28a). Thus, the examiners were not satisfied that these investments were off-balance sheet assets owned by the Bank (*id.* at 4a).

By the end of the week, the Comptroller determined that the Bank's off-balance sheet liabilities exceeded its off-balance sheet assets, and, therefore, the Bank was insolvent.[2] The Comptroller also determined that the Bank was engaged in unsafe and unsound bank practices. In response, the Comptroller began preparing a cease and desist order to direct the Bank to stop soliciting or accepting any additional off-balance sheet deposits. Before the order was issued, however, examiners learned of a run on the Bank. In light of these events, on June 21, 1985, at 10:20 p.m., the Comptroller declared the Bank insolvent and placed it in receivership (Pet. App. 5a).[3]

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[2] Proper record keeping required that the Bank's official balance sheet include the off-balance sheet assets and liabilities. When the Comptroller added those assets and liabilities to the balance sheet, the Bank's liabilities exceeded its assets. This imbalance was inconsistent with the fundamental accounting principle that assets must equal liabilities.

[3] The President and a Vice President of the Bank were later indicted, *inter alia,* for allegedly using "false statements, fraudulent documents, phony signatures," and "off-book transactions" to deceive federal bank regulators about the Bank's true condition. Trial is set for September 26, 1988. *United States* v. *Chuang, etc., et al.*, Cr. No. 87-440 (S.D.N.Y.).

b. Petitioner filed suit, asserting claims under the Federal Tort Claims Act (FTCA) (28 U.S.C. 2671 *et seq.*), the Administrative Procedure Act (APA) (5 U.S.C. 701 *et seq.*), and the Fifth Amendment. The Comptroller moved to dismiss the FTCA claim on the ground that it was barred by the discretionary function exception (28 U.S.C. 2680(a)). The district court denied the motion, concluding that the discretionary function exception is inapplicable when the government acts in an "entirely arbitrary or capricious" manner (Pet. App. 56a). The court stated that petitioner has a "very heavy burden in proving this claim, since even a gross abuse of discretion may not predicate an award of tort damages" (*id.* at 57a). Ultimately, after carefully considering the record, the district court granted summary judgment in favor of the Comptroller on all causes of action. The court concluded that the Comptroller's decision was "rationally based, and was not arbitrary, capricious, or made in bad faith" (*id.* at 22a).

c. The Court of Appeals for the District of Columbia Circuit affirmed, but on different grounds. The court began by noting that, at oral argument, petitioner had conceded that the only relief it sought was money damages. Thus, the court observed, petitioner's claim under the APA "serves only as a device upon which to predicate damages for alleged arbitrary and capricious actions of the Comptroller" (Pet. App. 5a-6a). The court then rejected the submission that the FTCA permitted a cause of action for damages under these circumstances. Remarking that while this Court has not precisely defined " 'every contour' " of the discretionary function exception (*id.* at 7a (quoting *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984)), "the actions complained of here seem the very paradigm Congress had in mind in fashioning the exception" (Pet. App. 7a).

Reviewing the statutory basis of the Comptroller's powers, the court noted that the Comptroller has broad authority to ensure that national banks engage in "safe and sound" banking business. In carrying out his authority in this case, the Comptroller had to determine whether the yellow CDs were liabilities of the Bank and whether the Bank had non-booked assets to cover those liabilities. Both of these determinations are "obvious policy judgments regarding what constitutes safe and sound bank practices" (*ibid.*). Further, the court stated, "surely the decision to close the Bank—made after a week of examination and in the face of a run of withdrawals—could not possibly be thought of as other than a discretionary act that was committed by Congress to the Comptroller's judgment" (*ibid.*). The court thus found that damages under the FTCA were not available. The court also rejected the district court's view that "entirely arbitrary and capricious action" was not covered by the discretionary function exception (*id.* at 8a).[4]

2. The court of appeals' decision is correct. It does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review by this Court is not warranted.

a. A decision by the Comptroller of the Currency to appoint a receiver for a national bank plainly involves "the permissible exercise of policy judgment," *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), slip op. 5, and thus is insulated from suit under the FTCA by the discretionary function exception. As this Court has explained, the exception is designed to protect against "judicial 'second guessing' of legislative and administrative decisions

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[4] The court of appeals did not reach petitioner's Fifth Amendment claim, because it was argued on appeal only in petitioner's reply brief (Pet. App. 9a). Petitioner has not raised its Fifth Amendment claim before this Court.

grounded in social, economic, or political policy through the medium of an action in tort." *United States* v. *Varig Airlines,* 467 U.S. at 814. Government action qualifies for the exception when the conduct involves "an element of judgment or choice" and rests on "considerations of public policy" (*Berkovitz,* slip op. 4-5). The public policy and discretionary dimensions to the Comptroller's actions are evident from the statutory framework that defines the Comptroller's authority.

The Comptroller of the Currency has broad powers to preserve the integrity and stability of the national banking system. If a national bank violates applicable law or persists in unsafe and unsound banking practices, the Comptroller has the discretion to issue cease and desist orders, to impose civil money penalties, to remove officers or directors pursuant to statutory procedures (12 U.S.C. 1818), or to appoint a conservator for the bank (12 U.S.C. 203). Moreover, the Comptroller also has the discretion to appoint a receiver for a bank when he is satisfied that it is insolvent: whenever the Comptroller "shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, * * * appoint a receiver who shall proceed to close up such association." 12 U.S.C. 191.[5]

The language of Section 191 gives the Comptroller the authority to make discretionary judgments based on considerations of public policy. To begin with, the Comptroller "may" appoint a receiver; Section 191 does not require him to do so. *Washington Nat'l Bank* v. *Eckels,* 57 F. 870, 872 (C.C.W.D. Wash. 1893) (power vested in Comptroller to appoint a receiver is "discretionary").

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[5] In order to effectuate these broad powers, the Comptroller is given equally broad powers to conduct bank examinations. 12 U.S.C. 481.

Moreover, Section 191 authorizes the appointment of a receiver when the Comptroller is "satisfied" that a national bank is insolvent and that "due" examination has occurred. Becoming "satisfied" of insolvency is inherently discretionary, as is the determination of how much examination is "due." [6] Section 191 thus enables the Comptroller to react flexibly to evolving situations concerning troubled banks and to develop appropriate responses. In doing so, the Comptroller must consider the impact on depositors and the national banking system, the government's resources, and other factors. All of these considerations establish that the Comptroller's decision to find insolvency and to appoint a receiver is an act of discretion, implementing fundamental economic policy, and is protected against suit under the FTCA. See *United States* v. *Varig Airlines*, 467 U.S. at 819-820 (agency determination about the degree of supervision of safety procedures in design and construction of aircraft was discretionary, as it implicated priorities set in light of policy objectives and budget restraints); *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) (establishing plans, specifications, and schedules for production and distribution of fertilizer was discretionary because "[w]here there is room for policy judgment and decision there is discretion").

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[6] Neither Section 191 nor the implementing regulations (12 C.F.R. 5.49(c)) define "insolvency." *In re Conservatorship of the Wellsville Nat'l Bank*, 407 F.2d 223, 226 n. 5 (3d Cir.), cert. denied, 396 U.S. 832 (1969). In *Wellsville Nat'l Bank*, the court expressed the view that "insolvency" encompasses both "the inability of a bank to meet its obligations" and the actual "closing of its doors" and observed that other courts have required that "for a bank to be solvent * * * it must own assets in an amount at least equal to its liabilities" (407 F.2d at 226 n. 5). In *In re Franklin Nat'l Bank*, 381 F. Supp. 1390 (E.D.N.Y. 1974), the Comptroller had found insolvency on the dual grounds that a bank could not meet its depositors' demands and that the bank had no real equity capital (*id.* at 1392-1393).

Recognizing the broad discretion of federal banking agencies, numerous lower courts have held that the decisions of the Comptroller and of other federal bank regulators in supervising banks and savings and loan associations are protected by the discretionary function exception. See *Emch* v. *United States,* 630 F.2d 523, 525-528 (7th Cir. 1980) (allegations of failure by the Comptroller to exercise due care in the regulation and examination of a bank), cert. denied, 450 U.S. 966 (1981); *Taylor* v. *Federal Home Loan Bank Board,* 661 F. Supp. 1341, 1349-1350 (N.D. Tex. 1986) (alleged wrongful cease-and-desist order and examination); *FDIC* v. *Jennings,* 615 F. Supp. 465 (W.D. Okla. 1985) (claim that the Comptroller wrongfully liquidated a bank), aff'd on other grounds, 816 F.2d 1488 (10th Cir. 1987); *FSLIC* v. *Williams,* 599 F. Supp. 1184, 1197-1200 (D. Md. 1984) (alleged excessive regulation); *First Sav. & Loan Ass'n* v. *First Fed. Sav. & Loan Ass'n,* 531 F. Supp. 251, 254-255 (D. Haw. 1981) (alleged conspiracy to place savings and loan in receivership); *First State Bank* v. *United States,* 471 F. Supp. 33, 35-36 (D.N.J. 1978) (alleged negligent bank examination), aff'd on other grounds, 599 F.2d 558 (3d Cir. 1979); *Newberg* v. *FSLIC,* 317 F. Supp. 1104, 1106-1107 (N.D. Ill. 1970) (alleged wrongful liquidation); *Davis* v. *FDIC,* 369 F. Supp. 277, 278-280 (D. Colo. 1974) (alleged wrongful closure).

Notwithstanding the language and purpose of Section 191, petitioner argues that the Comptroller's decision to declare a national bank insolvent is not a discretionary one, but is equivalent to the nondiscretionary "decision of a certified public accountant whether a corporation is or is not insolvent" (Pet. 9). This characterization misconstrues the nature and quality of the Comptroller's determination of a bank's insolvency, as recognized by this Court in *Easton* v. *Iowa,* 188 U.S. 220 (1903). In *Easton,* the Court held that a state law making it a crime for a bank officer to

accept deposits on behalf of an insolvent bank was preempted by federal laws regulating national banks, including the provision for the Comptroller to appoint a receiver when he is satisfied of the bank's insolvency (*id.* at 227, 231-232, 238). The Court observed that the determination "[w]hether a bank is or is not actually insolvent may be, often, a question hard to answer" and described the Comptroller as having "discretion" to decide whether "final insolvency" could be escaped before closing a bank (*id.* at 232). The Court emphasized that the discretion accorded to the Comptroller was inconsistent with the state's rigid rule requiring a bank to cease accepting deposits when insolvent (*ibid.*).

The Court's reasoning in *Easton* refutes petitioner's concept that the Comptroller's determination of insolvency is a ministerial matter of totalling figures on a balance sheet. Rather, the determination requires a careful evaluation of a bank's obligations and resources, based on limited and perhaps conflicting evidence. Becoming "satisfied" of insolvency in these circumstances plainly requires action "according to one's judgment of the best course" (*Dalehite* v. *United States,* 346 U.S. at 34). More fundamentally, the Comptroller's appointment of a receiver upon becoming satisfied of insolvency involves a range of policy considerations arising from the needs of the banking system and of the bank's depositors. As the court of appeals aptly stated, "[t]he Comptroller, incident to his responsibilities, must make innumerable subtle judgments in describing the content of safe and sound bank practices – judgments that draw upon a mix of law, accounting, bank custom, and policy." Pet. App. 7a. Plainly, the Comptroller's decision is "of the nature and quality that Congress intended to shield from tort liability." *United States* v. *Varig Airlines,*

467 U.S. at 813.[7]

b. Petitioner argues that the discretionary function exception should not cover lawless or bad faith administrative action (Pet. 9). The court of appeals correctly rejected this argument.[8] Petitioner appears to contend that

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[7] This Court's recent decision in *Berkovitz* v. *United States*, No. 87-498 (June 13, 1988), is entirely consistent with the court of appeals' holding. *Berkovitz* concerned an FTCA claim that the FDA had licensed the production of a polio vaccine and had approved release of a specific lot of the vaccine in violation of federal regulations. This Court held that "the discretionary function exception will not apply when a federal statute, regulation or policy specifically prescribes a course of action for an employee to follow" (slip op. 4). The Court recognized, however, that a claim that the government incorrectly determined that a product complied with regulatory standards can be subject to the discretionary function exception. The test is whether, in determining compliance, "the agency officials making that determination permissibly exercise policy choice." *Id.* at 13. Application of that test here, as we have shown above, establishes that the discretionary function exception is available, since Section 191 gives the Comptroller great discretion in deciding whether a bank is insolvent and whether to appoint a receiver.

For similar reasons, petitioner is incorrect in asserting (Pet. 10) that the decision below is in conflict with *Myers & Myers, Inc.* v. *United States Postal Service*, 527 F.2d 1252 (2d Cir. 1975). The court's refusal to apply the discretionary function exception in that case rested on the allegation that the Postal Service had acted in violation of its own regulations (*id.* at 1261).

[8] Petitioner contends that the decision below conflicts with *Huntington Towers, Ltd.* v. *Franklin Nat'l Bank*, 559 F.2d 863 (2d Cir. 1977), cert. denied, 434 U.S. 1012 (1978). That contention misreads the Second Circuit's opinion. In *Huntington Towers*, a real estate developer whose loan commitments were not fulfilled by an insolvent bank sued the Comptroller, alleging that the Comptroller knew that the bank was insolvent five months before closing it, but "entered into an 'illegal and improper' plan to conceal it" (559 F.2d at 865). The court of appeals affirmed the dismissal of the claims against the Comptroller based on the discretionary function exception. (*id.* at

the FTCA should provide a remedy in money damages for decisions to close a bank based on assertedly incorrect determinations of insolvency. We believe that this view of the law cannot be reconciled with either the language or policy of the discretionary function exception. Section 2680(a) expressly immunizes the government against suit under the FTCA for discretionary acts or omissions, "whether or not the discretion involved be abused" (28 U.S.C. 2860(a)). If it is to have any meaning, the discretionary function exception must extend to "wrongful" conduct involving the exercise of discretion. To adopt petitioner's construction would read the discretionary function exception out of the FTCA. Under petitioner's view, the government's protection from a damages suit "would fail at the time it would be needed" (*Dalehite* v. *United States,* 346 U.S. at 36)—exactly when the government is accused of tortious wrongdoing. Permitting a tort suit upon allegations that discretion was exercised in bad faith would subject agencies to precisely the "sort of judicial intervention in policy making" through a tort suit that Congress meant to bar. *United States* v. *Varig Airlines,* 467 U.S. at 820.[9]

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at 870). In another part of the opinion, not discussing the FTCA, the court did state that "[a]bsent clear evidence of grossly arbitrary or capricious action * * *—a factor which does not appear to be present here—it is not for the courts to say whether or not the actions taken were justified in the public interest" (*id.* at 868). As the quoted statement indicates, the court did not have to address the appropriate treatment of grossly arbitrary and capricious conduct, nor did the court explain how its observation conformed to the FTCA's discretionary function exception. *Huntington Towers*' passing comment, in dicta, does not create a conflict with the decision of the District of Columbia Circuit here.

[9] See also *In re Consolidated United States Atmospheric Testing Litigation,* 820 F.2d 982, 996 (9th Cir. 1987), cert. denied, No. 87-953 (Feb. 29, 1988); *Smith* v. *Johns-Manville Corp.,* 795 F.2d 301, 308

This Court's decision in *Hatahley* v. *United States,* 351 U.S. 173 (1956), relied on by petitioner (Pet. 10), is not to the contrary. In that case, several Navajo Indians brought suit under the FTCA to recover damages for the destruction by federal agents of their horses which were grazing on public lands. This Court stated that, "[w]e are here not concerned with any problem of a discretionary function under the Act (see *Dalehite* v. *United States, supra*). These acts were wrongful trespasses not involving discretion on the part of the agents * * * " (351 U.S. at 181).

Even apart from the defects in his argument, petitioner's attempt to litigate the perimeters of the discretionary function exception is misplaced for an additional reason: this case presents no question of "bad faith" or "lawless" action. The district court addressed and rejected petitioner's claims that the Comptroller's decision was "arbitrary," "capricious," or in "bad faith." To the contrary, the court found that the decision was "rationally based" (Pet. App. 22a). There is, therefore, no occasion here to explore the outer reaches of the discretionary function exemption, since the Comptroller's actions here fell well within it.

c. Finally, petitioner argues that review of this case is appropriate since courts are not in agreement as to the "proper scope of the 'discretionary function' exception" (Pet. 11). None of the cases cited by petitioner exhibits any confusion about the application of the exception to the Comptroller or to regulatory conduct in any way similar to that involved in this case.[10]

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n.10 (3d Cir. 1986); *Allen* v. *United States,* 816 F.2d 1417 (10th Cir. 1987), cert. denied, No. 87-316 (Jan. 11, 1988); *Myslakowski* v. *United States,* 806 F.2d 94, 97-98 (6th Cir. 1986), cert. denied, No. 86-1389 (Mar. 30, 1987); *Cisco* v. *United States Through EPA,* 768 F.2d 788 (7th Cir. 1985).

[10] The cases relied upon by petitioner – *Brown* v. *United States,* 790 F.2d 199 (1st Cir. 1986), cert. denied, No. 86-528 (Jan. 20, 1987); *Eklof*

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1988

Marine Corp. v. *United States*, 762 F.2d 200 (2d Cir. 1985); and *Allen* v. *United States*, 816 F.2d 1417 (10th Cir. 1987), cert. denied, No. 87-316 (Jan. 11, 1988)—involve other agencies and other types of decisions. *Brown* involved the question whether the government could be held liable for the negligence of the National Oceanic and Atmospheric Administration in maintaining a weather observation buoy. In *Eklof*, the issue was whether the government could be held liable for the Coast Guard's alleged negligence in placing a navigation buoy. Finally, *Allen* merely lists FTCA decisions reaching different results in specific factual settings, none of which involved the type of activity at issue here.

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